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In the Supreme Court of the United States

OCTOBER TERM, 1954

No. 663

WILLIAM Y. FONG, AS GUARDIAN AD LITEM FOR FONG WONE JING, FONG HUNG WING AND FONG NGAR JING, PETITIONERS

v.

JOHN FOSTER DULLES, AS SECRETARY OF STATE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR RESPONDENT

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1–4), which was in substitution for an earlier opinion filed in the same case (Pet. App. 5–8), is reported at 217 F. 2d 138.

JURISDICTION

The judgment of the court of appeals was entered on November 23, 1954 (R. 123). A timely petition for rehearing was denied on January 25, 1955 (R. 124). The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Whether the court of appeals erred when it affirmed the judgment of the district court on the ground that petitioners had failed to allege and prove that any of them had claimed a right as a national of the United States and had been denied such right upon the ground that he or she was not a national of the United States, it appearing that the failure in proof found to exist was due in part to the unavailability at the time of the trial of the State Department file in petitioners' case, and that all parties assumed at the trial that petitioners had been denied documents to travel to the United States upon the ground that they were not nationals.

STATUTE INVOLVED

Section 503 of the Nationality Act of 1940, 54 Stat. 1137, 1171, 8 U. S. C. (1946 ed.) 903, provided, in part, as follows:

> If any person who claims a right or privilege as a national of the United States is denied such right or privilege by any Department or agency, or executive official thereof, upon the ground that he is not a national of the United States, such person, regardless of whether he is within the United States or abroad, may institute an action against the head of such Department or agency in the District Court of the United States for the District of Columbia or in the district court of the United States for the district in which such person

claims a permanent residence for a judgment declaring him to be a national of the United States. If such person is outside the United States and shall have instituted such an action in court, he may, upon submission of a sworn application showing that the claim of nationality presented in such action is made in good faith and has a substantial basis, obtain from a diplomatic or consular officer of the United States in the foreign country in which he is residing a certificate of identity stating that his nationality status is pending before the court, and may be admitted to the United States with such certificate upon the condition that he shall be subject to deportation in case it shall be decided by the court that he is not a national of the United States. * * *[1]

STATEMENT

Pursuant to Section 503 of the Nationality Act of 1940 (8 U. S. C. (1946 ed.) 903) (*supra*), petitioners (two girls and a boy), through their guardian ad litem, instituted an action in the United States District Court for the Northern District of California against the Secretary of State seeking a declaration of United States na-

[1] This statute has been repealed by the Immigration and Nationality Act of 1952, 66 Stat. 163 (8 U. S. C. 1101, *et seq.*) which became effective December 24, 1952, but Section 405 (a) of the latter Act continues the former statute in force and effect as to suits which were pending when the new Act became effective. (66 Stat. 280).

tionality (R. 3–11). The complaint alleged that each of the petitioners was the Chinese-born child of an American citizen, Fong Lim Fong, who had married in China and had died there during World War II (R. 3–5). The complaint further alleged that applications were filed with the American consulate at Hong Kong for the issuance of United States passports or travel documents in behalf of petitioners, and that, on or about January 24, 1952, each of them was informed that "their applications for documentation had been denied, and that 'the Consulate General declines to afford you facilities for the execution of an affidavit for the purpose of travelling to the United States' " (R. 5–6). The complaint further alleged that the refusal to permit petitioners to proceed to a port of entry for the purpose of having their admissibility determined by the agency charged with such duty "is an arbitrary and unreasonable refusal or denial of a right or privilege of a United States national" (R. 6). It also alleged that plaintiffs' applications for documentation as United States citizens were denied and that the Department of State "through its official executive at Hong Kong did, on or about January 24, 1952, deny the plaintiffs * * * a right or privilege as nationals of the United States" (R. 6).

The answer of the Secretary of State (R. 8–11) denied that petitioners were the lawful blood children of the claimed father (R. 8), and affirma-

tively asserted that petitioners "do not have any right or privilege as nationals of the United States" (R. 9). As to the allegations with respect to the refusal of documentation at Hong Kong, the answer stated that the defendant "has no knowledge, information or belief" with respect thereto "and therefore denies the same" (R. 9).

At the trial,[2] government counsel stated to the court that the entire State Department file on petitioners had been lost, and that, despite an intensive search, the file had not been found, that the government had no witnesses, and that "we do not know why the Consul denied them in the first place" (R. 20).

Petitioners offered the following evidence:

Each of the plaintiffs testified that they were the children of Fong Lim Fong (who was shown to have been admitted to the United States as an American citizen (R. 25)) and his wife, Yee Shee, and had been born in Gong Mee Village. All said they had lived together with their mother and an elder brother who came to the United States in 1949. (R. 59–60, 66–68, 71–73.)

Fong Wone Jing testified that she was born on January 7, 1934 (R. 59). It was stipulated that the records showed that Fong Lim Fong, the alleged American-citizen father, had returned to

[2] Petitioners had been allowed to proceed to the United States under certificates of identity (R. 19).

San Francisco on January 17, 1933, and had departed from there on January 16, 1934 (R. 28). The alleged grandmother, who was 71 at the time of the trial (R. 27), testified that in 1935 she had visited her son and his wife in China, that they had a son and daughter at that time, and that, when the grandmother left early in 1936, the girl could walk (R. 29, 36). An aunt, who accompanied the grandmother to China, testified that the girl was not quite two at the time of their visit to China (R. 74–76).

Fong Hung Wing testified that he was born on January 30, 1936 (R. 66). The alleged grandmother testified that while she visited her son Fong Lim Fong in China, a son was born to her daughter-in-law, named Fong Ngar Jing (R. 30) (actually the name of the youngest plaintiff, a girl). Later, she identified a photograph as taken in China shortly before she left and said that it showed Fong Hung Wing (the baby) in her arms (R. 34). The aunt, who accompanied the grandmother to China, also testified that a son was born to Yee Shee during the visit (R. 77–78).

Fong Ngar Jing testified that she was born November 7, 1937 (R. 71). The grandmother testified that, after she returned to the United States, her son Fong Lim Fong wrote that he had had another daughter, Fong Ngar Jing (R. 35).

Fong Din Deck, also known as Fong Hung Fong, who had been admitted to the United

States in 1949, testified that he was the eldest child of Fong Lim Fong and that the three plaintiffs were his brother and sisters, that they had all lived with their mother (and until 1938 with their father) (R. 50–58). A photograph, which he testified had been taken in 1949 (R. 58), was identified by all the witnesses as being that of Yee Shee, the mother, and the four children (Ex. 3, R. 27–28, 58, 63, 64, 69, 72–73, 78).

At the conclusion of the evidence, the trial judge stated that he would take the case under advisement (R. 101). He commented informally that he believed the San Francisco members of the family were "themselves acting in good faith" (R. 101). In formal findings, he found that plaintiffs did not have permanent residence and domicile in the United States or the Northern District of California (R. 13) and that they "failed to introduce evidence of sufficient clarity" to satisfy the court that Fong Lim Fong was their father or that they were in truth and in fact the persons they claimed to be (R. 13–14). Accordingly, he denied the relief sought (R. 14–15).

In another case of the same general character decided the same day, *Ly Shew* v. *Acheson,* 110 F. Supp. 50 (N. D. Cal.) (Pet. App. 9–30), the same district judge held that in such cases the burden of proof was on the plaintiffs to establish their citizenship by "clear and convincing" evidence (Pet. App. 26). That ruling was re-

versed on appeal to the Court of Appeals for the Ninth Circuit (*Ly Shew* v. *Dulles*, 219 F. 2d 413 (Pet. App. 31–56)), the court of appeals holding that the burden of proof was the ordinary one resting on the plaintiff in a civil action (Pet. App. 47). After first directing entry of judgment in favor of the plaintiffs in the *Ly Shew* case (Pet. App. 41), the appellate court amended its opinion to order reconsideration by the district court in the light of its opinion setting forth the proper standard of proof (Pet. App. 47).

In the instant case, the court of appeals, on the same day that it handed down its first opinion in the *Ly Shew* case, affirmed the judgment of the district court (Pet. App. 5–8). It found at that time that Section 503 gave petitioners a right of action (Pet. App. 7), that counsel for the Government had admitted that the claimed applications had been denied (Pet. App. 7), and that the denial constituted a denial of a privilege as a national (Pet. App. 7–8). It also found that petitioners had failed to prove their claim (Pet. App. 8). Subsequently, the court withdrew this opinion and substituted a new opinion (Pet. App. 1–4) in which it affirmed the judgment of the district court on the ground that petitioners had failed to allege or prove that any of them had claimed a right or privilege as a national of the United States and had been denied such right or privilege by an agency of the United States "upon the ground that he or she

was not a national of the United States" (Pet. App. 4).

DISCUSSION

1. The Court of Appeals for the Ninth Circuit has held that an action under former Section 503 of the Nationality Act of 1940 lies at the instance of one who claims citizenship as the foreign-born child of an American-citizen parent and who has been denied a right or privilege as a national of the United States on the ground that he is not such a child and therefore not such a national. *Fong Nai Sun* v. *Dulles,* 219 F. 2d 269. It has also ruled that the denial of a passport is a denial of a right or privilege as a national, a ruling which is in accord with that of the Court of Appeals for the Seventh Circuit in *Lee Wing Hong* v. *Dulles,* 214 F. 2d 753. It has further held that the burden of proof to establish United States nationality under such circumstances is the ordinary one, and not that of clear and convincing evidence. *Ly Shew* v. *Dulles,* 219 F. 2d 413 (C. A. 9) (Pet. App. 42–56). None of these issues is here involved.

The decision in the instant case turns on the narrow ground that the complaint did not allege and the evidence did not show that the denial of a right or privilege as a national was "upon the ground that [such person] is not a national of the United States," as required by Section 503. See also *Dulles* v. *Lee Gnan Lung,* 212 F. 2d 73 (C. A.

9).[3] This is not a mere technicality. Actions under Section 503 have been filed where the plaintiff's application for travel documents had not in fact been denied on the ground that such person was not a national, as, for example, where there had been merely a request by the American Consul for additional information or a failure to act pending investigation. In such circumstances, no right of action under Section 503 has accrued. See *Ling Share Yee* v. *Acheson*, 214 F. 2d 4 (C. A. 3), certiorari denied, 348 U. S. 873. The decision below is thus correct in holding that it is incumbent on the plaintiff in a Section 503 action to plead and prove that he has claimed and been denied a right as a national on the ground that he is not a national.

In the instant case, however, the case was allowed to go to trial even though there was no express allegation that the denial of travel documents was on the ground that the infant petitioners were not nationals. Had the proof shown the reason for the denial, the formal defect in pleadings would probably have been regarded as cured by the proof. Cf. F. R. Civ. P., Rule 8 (f). While such proof was not offered at the trial, even though petitioners were before the court and

[3] In a recent opinion in another case, *Fong Nai Sun* v. *Dulles*, 219 F. 2d 269 (C. A. 9), a different panel of the court of appeals explained (at p. 271) that the point decided in the instant decision "was that the allegations of the complaint were insufficient to invoke the application of [Section 503]."

presumably could have testified to the facts, the United States Attorney did state at the outset of the trial that, despite diligent search, petitioners' State Department file, which would have shown the reason for the denial, had been lost, and all parties seem to have conducted the trial on the assumption that the denial had been upon the ground that petitioners were not nationals. Petitioners' State Department file, we are informed, has since been found. Had it been introduced in evidence, it would have shown that petitioners had been denied travel documents upon the ground that their claim was fraudulent. Since the absence of the file, for which petitioners were not responsible, may have contributed to the deficiencies in petitioners' proof which the court of appeals regarded as fatal to their claim, we suggest that it would be a proper disposition of this case to grant the petition for certiorari and remand the case to the district court for further proceedings and appropriate findings.

2. This disposition of the case seems appropriate for the additional reason that the finding of the district court that petitioners had not sustained the burden of proof was predicated (see R. 11) upon the standard of proof announced by that court in *Ly Shew* v. *Acheson,* 110 F. Supp. 50 (Pet. App. 9–30), reversed, *Ly Shew* v. *Dulles,* 219 F. 2d 413 (C. A. 9) (Pet. App. 42–56). The district court proceeded on the theory that the burden of proof resting on the plaintiffs was

different from and heavier than the ordinary burden of proof resting on plaintiffs in civil actions. The suggestion that such a higher standard of proof obtained in suits under Section 503 has since been rejected by the Court of Appeals for the Ninth Circuit. *Ly Shew* v. *Dulles, supra.*

CONCLUSION

For the reasons stated in this memorandum, we conclude that the petition for a writ of certiorari should be granted, the judgment of the court of appeals vacated, and the case remanded to the district court (a) for determination of the grounds for the denial of petitioners' applications for travel documents and (b) if it is found that such documents were denied on the ground that petitioners were not nationals, for determination (applying the governing standard of proof) whether petitioners have established that they are nationals of the United States.

Respectfully submitted,

SIMON E. SOBELOFF,
Solicitor General.

MAY 1955.

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